

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

PATRICK WAYNE ADAMS,

Case No.: 3:19-cv-00630-MMD-WGC

Plaintiff,

Report & Recommendation of United States Magistrate Judge

V.

Re: ECF Nos. 1, 1-1

EDWARD GENE LINDBLADE,
JEANIE LYNNE LINDBLADE,

Defendants.

This Report and Recommendation is made to the Honorable Miranda M. Du, Chief United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Plaintiff, is an inmate incarcerated through the Nevada Department of Corrections (NDOC), but is currently being housed at the Saguaro Correctional Center in Arizona. He has filed an application to proceed in forma pauperis (IFP) (ECF No. 1) and pro se complaint (ECF No. 1-1).

I. IFP APPLICATION

A person may be granted permission to proceed IFP if the person “submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1).

The Local Rules of Practice for the District of Nevada provide: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]. The

1 application must be made on the form provided by the court and must include a financial affidavit
2 disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

3 "[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some
4 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
5 (quotation marks and citation omitted). A litigant need not "be absolutely destitute to enjoy the
6 benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

7 An inmate submitting an application to proceed IFP must also "submit a certificate from
8 the institution certifying the amount of funds currently held in the applicant's trust account at the
9 institution and the net deposits in the applicant's account for the six months prior to the date of
10 submission of the application." LSR 1-2; *see also* 28 U.S.C. § 1915(a)(2). If the inmate has been
11 at the institution for less than six months, "the certificate must show the account's activity for this
12 shortened period." LSR 1-2.

13 If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount
14 of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an
15 initial partial filing fee that is calculated as 20 percent of the greater of the average monthly
16 deposits or the average monthly balance for the six-month period immediately preceding the filing
17 of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid, the
18 prisoner is required to make monthly payments equal to 20 percent of the preceding month's
19 income credited to the prisoner's account. 28 U.S.C. § 1915(b)(2). The agency that has custody of
20 the prisoner will forward payments from the prisoner's account to the court clerk each time the
21 account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

22 Plaintiff's certified account statement indicates that his average monthly balance for the
23 last six months was \$0, and his average monthly deposits were \$0.

1 Plaintiff's application to proceed IFP should be granted. Plaintiff should not be required to
2 pay an initial partial filing fee given that his average monthly balance and deposits have been \$0;
3 but hereafter, whenever his prison account exceeds \$10, he must make monthly payments in the
4 amount of 20 percent of the preceding month's income credited to his account until the \$350 filing
5 fee is paid.

6 **II. SCREENING**

7 **A. Standard**

8 Under the statute governing IFP proceedings, "the court shall dismiss the case at any time
9 if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal--
10 (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii)
11 seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.
12 § 1915(e)(2)(A), (B)(i)-(iii).

13 In addition, under 28 U.S.C. § 1915A, "[t]he court shall review, before docketing, if
14 feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in
15 which a prisoner seeks redress from a governmental entity or officer or employee of a
16 governmental entity." 28 U.S.C. § 1915A(a). In conducting this review, the court "shall identify
17 cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint-- (1)
18 is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks
19 monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b)(1)-(2).

20 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
21 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and
22 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a
23 complaint under these statutes, the court applies the same standard as is applied under Rule

1 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule
 2 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232
 3 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

4 The court must accept as true the allegations, construe the pleadings in the light most
 5 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395
 6 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are “held to less stringent
 7 standards than formal pleadings drafted by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9 (1980)
 8 (internal quotation marks and citation omitted).

9 A complaint must contain more than a “formulaic recitation of the elements of a cause of
 10 action,” it must contain factual allegations sufficient to “raise a right to relief above the speculative
 11 level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading must contain
 12 something more ... than ... a statement of facts that merely creates a suspicion [of] a legally
 13 cognizable right of action.” *Id.* (citation and quotation marks omitted). At a minimum, a plaintiff
 14 should include “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570; *see*
 15 *also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

16 A dismissal should not be without leave to amend unless it is clear from the face of the
 17 complaint that the action is frivolous and could not be amended to state a federal claim, or the
 18 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
 19 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

20 **B. Plaintiff's Complaint**

21 Plaintiff's complaint is titled a tort action under Nevada Revised Statute (NRS) 41.0322, as
 22 well as a civil rights action under 42 U.S.C. § 1983. He names as defendants Edward Gene
 23 Lindblade and Jeanie Lynne Lindblade, whom he alleges reside in California. (ECF No. 1-1 at 1,

1 2.) Plaintiff avers that in March of 2017, Defendants were visiting John Ames Lindblade at his
2 home in Gardnerville, Nevada, where John Lindblade lived with his daughter, Vicky Lindblade.
3 Plaintiff alleges that during that visit, Defendants seized letters that Plaintiff had written to Vicky
4 Lindblade after they searched Vicky's property without her permission. Then, over a year later, the
5 Defendants filed an emergency petition in the Douglas County District Court, where he claims
6 they replaced a page of a letter with a page they forged. He asserts that they did so to gain control
7 over John Ames Lindblade's sizeable estate and to keep Vicky from communicating with Plaintiff.
8 He claims violations of the Fourth Amendment related to search and seizure and the Fourteenth
9 Amendment's Due Process Clause, as well as violation of the First Amendment right to freedom
10 of speech and the Eighth Amendment's prohibition on cruel and unusual punishment.

11 Preliminarily, NRS 41.0322 applies to an action by a person in custody of the Nevada
12 Department of Corrections (NDOC) who seeks to proceed with an action against NDOC or its
13 agents, former officers, employees or contractors for torts under NRS 41.031. These defendants
14 are not alleged to be or have been agents, former officers, employees or contractors of NDOC;
15 therefore, NRS 41.0322 is inapplicable to this case. NRS 41.031 pertains to the State of Nevada's
16 waiver of immunity for actions brought against it or any of its political subdivisions brought in
17 State court. Again, Plaintiff is not suing the State of Nevada or its political subdivisions; therefore,
18 this statute is also inapplicable.

19 42 U.S.C. § 1983 provides a mechanism for the private enforcement of substantive rights
20 conferred by the Constitution and federal statutes. Section 1983 "is not itself a source of
21 substantive rights, but merely provides a method for vindicating federal rights elsewhere
22 conferred." *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (internal quotation marks and citation
23 omitted). To state a claim under section 1983, a plaintiff must allege: (1) his or her civil rights

were violated, (2) by a person *acting under the color of state law*. *West v. Atkins*, 487 U.S. 42, 48-49 (1988). To adequately plead the section 1983 elements, a complaint must identify what constitutional right each defendant violated, and provide sufficient facts to plausibly support each violation. *See e.g., Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002) (noting defendants must personally participate in misconduct to be liable under section 1983). The "threshold inquiry in a § 1983 suit" requires courts "to 'identify the specific constitutional right' at issue." *Manuel v. City of Joliet*, 137 S.Ct. 911, 920 (2017) (citing *Albright*, 510 U.S. at 271). "After pinpointing that right, courts still must determine the elements of, and rules associated with, an action seeking damages for its violation." *Id.* (citing *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978)).

Plaintiff may not maintain this action under 42 U.S.C. § 1983 because the defendants are not state actors acting under color of law who are subject to suit under section 1983.

For these reasons, Plaintiff's action should be dismissed. The dismissal should be with prejudice as it does not appear that the complaint could be amended to state a claim.

III. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Judge enter an order:

(1) **GRANTING** Plaintiff's IFP application (ECF No. 1). Plaintiff should not be required to pay an initial partial filing fee; however, whenever his prison account exceeds \$10, he should be required to make monthly payments in the amount of 20 percent of the preceding month's income credited to his account until the full \$350 filing fee is paid. This is required even if the action is dismissed, or is otherwise unsuccessful. The Clerk should be directed to **SEND** a copy of an order adopting and accepting this Report and Recommendation to the attention of **Chief of Inmate Services for the Nevada Department of Corrections**, P.O. Box 7011, Carson City, Nevada 89702.

(2) The complaint (ECF No. 1-1) should be **FILED**.

(3) The action should be **DISMISSED WITH PREJUDICE**.

The Plaintiff should be aware of the following:

1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to

5 this Report and Recommendation within fourteen days of being served with a copy of the Report

6 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s Report

7 and Recommendation" and should be accompanied by points and authorities for consideration by

⁸ the district judge.

2. That this Report and Recommendation is not an appealable order and that any notice of

10 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed

11 until entry of judgment by the district court.

Dated: December 13, 2019.

Walter G. Cobb

William G. Cobb
United States Magistrate Judge